[Cite as *State ex rel. United Auto Aerospace v. Ohio Bur. of Workers' Comp.*, 2005-Ohio-355.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. United Auto Aerospace & Agricultural Implement Workers of America, Region 2-B,	:	
[Relator],	:	
v.	:	No. 03AP-361
Ohio Bureau of Workers' Compensation and James Conrad, Administrator, Ohio Bureau of Workers' Compensation,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on February 3, 2005

Stephen E. Mindzak Law Offices, LLC, and *Stephen E. Mindzak*, for relator.

Jim Petro, Attorney General, *James A. Barnes* and *Erica L. Bass*, for respondents.

IN MANDAMUS
ON RESPONDENTS' MOTION TO DISMISS
ON OBJECTIONS TO MAGISTRATE'S DECISION

PER CURIAM.

{¶1} On April 15, 2003, relator, United Auto Aerospace & Agricultural Implement Workers of America, Region 2-B, filed this original action seeking a writ of mandamus that orders respondents, Ohio Bureau of Workers' Compensation and its Administrator, James

Conrad, to follow the law as set forth in two recent Ohio Supreme Court cases. Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, the matter was referred to a magistrate of this court. On May 7, 2003, respondents filed a motion to dismiss in which they asserted (1) relator lacks standing to bring the present action, and (2) relator has an adequate remedy at law.

{¶2} On January 30, 2004, the magistrate rendered a decision, including findings of fact and conclusions of law. (Attached as Appendix A.) In her decision, the magistrate concluded relator has standing to pursue this original action, but recommended that the court grant respondents' motion to dismiss or deny the requested writ of mandamus. Relator and respondents timely filed objections to the magistrate's decision, which were heard in oral argument.

{¶3} In its objections, relator asserts the magistrate erred in concluding that relator has a remedy in the ordinary course of the law such that its request for a writ of mandamus must be denied. Relator further asserts the magistrate incorrectly determined the case of *Glaspell v. Ohio Edison Co.* (1987), 29 Ohio St.3d 44 imposes no duty upon respondents that would be enforceable in mandamus.

{¶4} Contrary to relator's contentions, the magistrate properly concluded relator, if it can demonstrate standing, has an adequate remedy in the ordinary course of the law through an action for declaratory judgment filed in the court of common pleas. Through an action in that court, relator may seek a declaration that the amended version of R.C. 4123.931 is unconstitutional. Because the allegations of relator's complaint for a writ of

mandamus indicate that the real object sought is a declaratory judgment and a prohibitory injunction, the complaint does not state a cause of action in mandamus and is properly dismissed for want of jurisdiction. *State ex rel. Grendell v. Davidson* (1999), 86 Ohio St.3d 629, 634; *State ex rel. Phillips v. Lorain Cty. Bd. of Elections* (2001), 93 Ohio St.3d 535, 537; *State ex rel. Cunningham v. Amer Cunningham Co., L.P.A.* (2002), 94 Ohio St.3d 323, 324; *State ex rel. Ohio AFL-CIO v. Taft*, Franklin App. No. 03AP-337, 2003-Ohio-6828, ¶6. Relator's first objection is overruled.

{¶5} In its second objection, relator asserts the magistrate wrongly determined that *Glaspell* imposes no duty upon respondents that is enforceable in mandamus. The magistrate correctly concluded that *Glaspell* is inapposite to the relief relator seeks and does not form the basis for a cause of action in mandamus. Relator's second objection is overruled.

{¶6} Whether or not relator has standing to bring this original action, relator has an adequate remedy at law in a declaratory judgment action filed in the common pleas court. Because an adequate remedy at law precludes our issuing a writ of mandamus, respondents' motion to dismiss is granted, rendering moot respondents' objections to relator's standing to bring this action.

{¶7} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts, and we adopt them as our own. Further, with the exception of the magistrate's conclusions regarding standing which we need not address, we conclude the magistrate properly applied the salient law to those facts, and

we adopt those conclusions of law as our own. In accordance with the magistrate's decision, we grant respondents' motion to dismiss relator's complaint.

Relator's objections overruled;
respondents' objections moot;
complaint dismissed.

BRYANT, J., and BROWN, P.J., concur.
SADLER, J., concurs in part and dissents in part.

SADLER, J., concurring in part and dissenting in part.

{¶8} I believe we are duty-bound to address respondents' objections, pursuant to Civ.R. 53(E)(4)(b). See *Drummond v. Drummond*, 10th Dist. No. 02AP-700, 2003-Ohio-587, ¶13; *Ferretti v. Graham* (Feb. 13, 2001), 10th Dist. No. 00AP-765; *In re Gilfillen*, 10th Dist. No. 02AP-1239, 2003-Ohio-3011, ¶17 ("resolution of the objections to the magistrate's findings of fact is not inconsequential. * * * Knowing which of the magistrate's factual findings the [trial] court adopted or rejected allows the parties, and [the appellate] court, to proceed appropriately in the appellate review of the [trial] court's decision.")

{¶9} For this reason, I dissent from the majority's conclusion that respondents' objections are moot, and would rule upon them. I concur in the majority opinion in all other respects, and I concur in the judgment.

_____

APPENDIX A

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. United Auto Aerospace & Agricultural Implement Workers of America, Region 2-B,	:	
[Relator],	:	
v.	:	No. 03AP-361
Ohio Bureau of Workers' Compensation and James Conrad, Administrator, Ohio Bureau of Workers' Compensation,	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on January 30, 2004

Stephen E. Mindzak Law Offices, LLC, and *Stephen E. Mindzak*, for relator.

Jim Petro, Attorney General, *James A. Barnes* and *Erica L. Bass*, for respondents.

IN MANDAMUS

{¶10} In this original action, relator, the United Auto Aerospace & Agricultural Implement Workers of America, Region 2-B ("UAW"), seeks an extraordinary writ of

mandamus compelling the Ohio Bureau of Workers' Compensation and its administrator, James Conrad (referred to herein as a single respondent, "BWC"), to comply with the Ohio Supreme Court's decision in *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St.3d 115.

Findings of Fact:

{¶11} In the present action, the parties have not presented facts relating to a specific workers' compensation claim or claimant, nor any facts relating to a specific tort action against a third-party tortfeasor. Only one item of evidence was submitted, a sample notice of subrogation rights sent by the BWC to an employer and injured worker.

Legislative History and Procedural Background:

{¶12} 1. In September 1995, the Ohio General Assembly enacted House Bill 278 ("H.B. 278"), which was codified at R.C. 4123.931, providing as follows:

> (A) The payment of compensation or benefits pursuant to this chapter or Chapter 4121., 4127., or 4131., of the Revised Code creates a right of subrogation in favor of a statutory subrogee against a third party. A statutory subrogee's subrogation interest includes past payments of compensation and medical benefits and estimated future values of compensation and medical benefits arising out of an injury to or disability or disease of a claimant.
>
> (B) A claimant shall notify a statutory subrogee of the identity of all third parties against whom the claimant has or may have a right of recovery. No settlement, compromise, judgment, award, or other recovery in any action or claim by a claimant shall be final unless the claimant provides the statutory subrogee with prior notice and a reasonable opportunity to assert its subrogation rights. If a statutory subrogee is not given that notice, the third party and the claimant shall be jointly and severally liable to pay the

statutory subrogee the full amount of the subrogation interest.

(C) The right of subrogation under this chapter is automatic, regardless of whether a statutory subrogee is joined as a party in an action by a claimant against a third party. A statutory subrogee may assert its subrogation rights through correspondence with the claimant and the third party or their legal representatives. A statutory subrogee may institute and pursue legal proceedings against a third party either by itself or in conjunction with a claimant. If a claimant disputes the validity or amount of an asserted subrogation interest, the claimant shall join the statutory subrogee as a necessary party to the action against the third party.

(D) The entire amount of any settlement or compromise of an action or claim is subject to the subrogation right of a statutory subrogee, regardless of the manner in which the settlement or compromise is characterized. Any settlement or compromise that excludes the amount of compensation or medical benefits shall not preclude a statutory subrogee from enforcing its rights under this section. The entire amount of any award or judgment is presumed to represent compensation and medical benefits and future estimated values of compensation and medical benefits that are subject to a statutory subrogee's subrogation rights unless the claimant obtains a special verdict or jury interrogatories indicating that the award or judgment represents different types of damages.

(E) Subrogation does not apply to the portion of any judgment, award, settlement, or compromise of a claim to the extent of a claimant’s attorney's fees, costs, or other expenses incurred by a claimant in securing the judgment, award, settlement, or compromise, or the extent of medical, surgical, and hospital expenses paid by a claimant from the claimant’s own resources for which reimbursement is not sought. No additional attorney’s fees, costs, or other expenses in securing any recovery may be assessed against any subrogated claims of a statutory subrogee.

Under R.C. 4123.93(B), the term "statutory subrogee" included the BWC and self-insured employers.

{¶13} 2. In June 1998, Rick Holeton was injured when he was working in a lift device that was hit by a truck. The BWC paid workers' compensation benefits. See *Holeton*.

{¶14} 3. Mr. Holeton and other related plaintiffs filed a tort action in federal district court against the truck driver and his employer. The BWC, which had already paid wage and medical benefits exceeding $190,000, asserted a "subrogation claim against any settlement made or judgment paid to Rick Holeton by or on behalf of" these defendants. *Holeton,* at 116.

{¶15} 4. In the trial court, plaintiffs disputed "the validity of BWC's subrogation claim and argue[d] that the statute violates relevant sections of Ohio's constitution." Id. Plaintiffs filed a "motion for summary judgment asking the court to declare the subrogation statute unconstitutional" or, in the alternative, to certify the issue to the Ohio Supreme Court. Id.

{¶16} 5. The federal district court in *Holeton* certified numerous questions of law to the Ohio Supreme Court regarding former R.C. 4123.931 (H.B. 278), and the Supreme Court agreed to answer eight questions. In response to five of the questions, the court found no inconsistency with the state constitution, statutes, or rules. However, it answered the following questions in the affirmative:

> 2. Does R.C. § 4123.931 violate Article I, Section 19 of the Ohio Constitution?

> 3. Does R.C. § 4123.931 violate Article I, Section 16 of the Ohio Constitution?
>
> * * *
>
> 5. Does R.C. § 4123.931 violate Article I, Section 2 of the Ohio Constitution?

{¶17} 6. In its *Holeton* opinion, the Ohio Supreme Court observed that, although the state has a legitimate interest in preventing double recoveries and may constitutionally preclude a tort victim from recovering twice for the same item of loss or type of damages, the statute must be reasonably related to that purpose. The court noted that reductions for collateral benefits are permissible only to the extent that the loss for which the collateral benefit compensates is actually included in the award. Id. at 122. Where the amount recovered from the tortfeasor combined with the workers' compensation benefits does not cover the actual total loss, no double recovery has occurred. Id. at 128. Further, the court held that a claimant-plaintiff has "a constitutionally protected interest in his or her tort recovery to the extent that it does not duplicate the employer's or bureau's compensation outlay." Id. at 122. A statue that "operates to take more of the claimant's tort recovery than is duplicative of the statutory subrogee's workers' compensation expenditures" is not reasonably related to its purpose and violates the state constitution. Id.

{¶18} 7. The court focused on two specific provisions of former R.C. 4123.931 that rendered it unconstitutional:

> * * * (1) the portion of R.C. 4123.931(A) that gives the statutory subrogee a right of subrogation with respect to "estimated future values of compensation and medical benefits," and (2) the portion of R.C. 4123.931(D) providing that "[t]he entire amount of any settlement or compromise of an action or claim is subject to the subrogation right of a statutory subrogee, regardless of the manner in which the settlement or compromise is characterized. Any settlement or compromise that excludes the amount of compensation or medical benefits shall not preclude a statutory subrogee from enforcing its right under this section."

Holeton, at 122.

{¶19} 8. With respect to the first provision, the court noted that the statute gave a right of subrogation with respect to "estimated future values of compensation and medical benefits," but the claimant may never receive these future benefits. Id. at 123. For example, the estimated future value may be based on a life expectancy of an injured worker or widow (in a wrongful death situation), but if that person dies prematurely or if the widow remarries shortly after the calculation is made, the subrogee then gets a windfall from the tort recovery because the projected benefits are never paid. The court concluded that the risk of overestimated future expenditures should not fall on the innocent claimant. The court suggested that "giving the subrogee the same kind of offset or credit against future payments that has always been used to recoup overpayments of compensation" would provide a more full and accurate reimbursement to the subrogee. Id. at 125.

{¶20} 9. Next, the court in *Holeton* concluded that the statute created two classes, those who obtain a jury award and those who obtain a settlement award, and

that H.B. 278's disparate treatment of those who settle their tort claims was arbitrary and unreasonable. When a claimant proceeded to trial against a third party and obtained a jury award, former R.C. 4123.931(D) provided that the jury would determine the amount of damages representing lost wages, medical costs, etc., and would also determine the portion of damages not covered by workers' compensation benefits, such as damages for pain and suffering, etc. Accordingly, part of the jury's total award of damages would go to reimburse the subrogee and part would go to the claimant to compensate him for losses not covered by workers' compensation benefits.

{¶21} In contrast, when a claimant obtained a settlement award, the entire amount of the settlement award was subject to the reimbursement right of the subrogee. The claimant "[was] precluded, under any circumstances, from showing that his or her settlement or portions thereof" did not represent or duplicate workers' compensation benefits. Id. at 125-126. The court noted that, when the settlement was for an amount less than the actual total damages, the combined amount of the settlement proceeds and workers' compensation benefits might be insufficient to cover all the claimant's actual loss. Therefore, former R.C. 4123.931(D) operated unconstitutionally "in these situations because it allows for reimbursement from proceeds that do not constitute a double recovery." Id. at 126.

{¶22} Moreover, in settlement situations, H.B. 278 could extinguish the rights of minor children, parents, and siblings who are beneficiaries in a wrongful death action but whose losses are not compensated under the workers' compensation laws. The court

held: "In this situation, the statute operates unconstitutionally to allow one person's tort recovery to be reduced or extinguished by another person's workers' compensation benefits." Id. at 127.

{¶23} Further, the court noted that the law of Ohio, as a general rule, does not tolerate any lien that prevent litigants from settling their controversies or which tends to encourage, promote, or extend litigation. Id. at 128. The court indicated that the subrogation statute impermissibly discouraged settlement.

{¶24} 10. The Ohio Supreme Court noted in *Holeton* that plaintiffs throughout Ohio were challenging the statute's constitutionality in tort actions. The court cited several of these cases and noted that it had granted discretionary appeals in *Yoh v. Schlachter* (Mar. 17, 2000), Williams App. No. WM-99-008 (a wrongful death action), and *In re Estate of Stewart* (June 28, 2000), Lorain App. No. 99CA007422 (also a wrongful death action). See *Holeton*, at 129.

{¶25} 11. In *Holeton*, the Ohio Supreme Court held as follows:

> Conclusion
>
> We hold that R.C. 4123.931 does not violate Sections 15, 28, or 35, Article II of the Ohio Constitution, is not rendered invalid by Civ.R. 49(C), and does not constitute an invalid waiver under R.C. 4123.80. We hold, however, that R.C. 4123.931 does violate Sections 2, 16, and 19, Article I of the Ohio Constitution. In so holding, we do not accept the proposition that a workers' compensation subrogation statute is *per se* unconstitutional, and nothing in this opinion shall be construed to prevent the General Assembly from ever enacting such a statute. **We hold only that R.C. 4123.931, in its present form, is unconstitutional.**

> Accordingly, we advise the federal court that R.C. 4123.931 is unconstitutional under Ohio law.
>
> *Judgment accordingly.*

Id. at 135. (Emphasis added.)

{¶26} 12. In November 2002, the General Assembly enacted Substitute Senate Bill 227 ("S.B. 227"), which amended several statutes, including the following:[1]

> Sec. 4123.93. As used in sections 4123.93 and 4123.931 of the Revised Code:
>
> (A) "Claimant" means a person who is eligible to receive compensation ~~or~~, medical benefits, or death benefits under this chapter or Chapter 4121., 4127., or 4131. of the Revised Code~~, including any dependent or person whose eligibility is the result of an injury to or occupational disease of another person~~.
>
> (B) "Statutory subrogee" means the administrator of ~~the bureau of~~ workers' compensation, a self-insuring employer, or an employer that contracts for the direct payment of medical services pursuant to division (L) of section 4121.44 of the Revised Code.
>
> (C) ~~"Subrogated amounts" include, but are not limited to, the following:~~
>
> ~~(1) Amounts recoverable from any third party, notwithstanding any limitations by the third party concerning its responsibility to make payments in cases involving workers' compensation under Chapter 4121., 4123., 4127., or 4131. of the Revised Code;~~
>
> ~~(2) Amounts recoverable from a claimant's insurer in connection with underinsured or uninsured motorist coverage, notwithstanding any limitation contained in Chapter 3937. of the Revised Code;~~

[1]A strikethrough indicates where language was deleted from the former statute, and underlining indicates where language was added.

~~(3) Amounts that a claimant would be entitled to recover from a political subdivision, notwithstanding any limitations contained in Chapter 2744. of the Revised Code.~~

~~(D)~~ "Third party" means an individual, private insurer, public or private entity, or public or private program that is or may be liable to make payments to a person without regard to any statutory duty contained in this chapter or Chapter 4121., 4127., or 4131. of the Revised Code.

(D) "Subrogation interest" includes past, present, and estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits, and any other costs or expenses paid to or on behalf of the claimant by the statutory subrogee pursuant to this chapter or Chapter 4121., 4127., or 4131. of the Revised Code.

(E) "Net amount recovered" means the amount of any award, settlement, compromise, or recovery by a claimant against a third party, minus the attorney's fees, costs, or other expenses incurred by the claimant in securing the award, settlement, compromise, or recovery. "Net amount recovered" does not include any punitive damages that may be awarded by a judge or jury.

(F) "Uncompensated damages" means the claimant's demonstrated or proven damages minus the statutory subrogee's subrogation interest.

Sec. 4123.931. (A) The payment of compensation or benefits pursuant to this chapter or Chapter 4121., 4127., or 4131., of the Revised Code creates a right of ~~subrogation~~ recovery in favor of a statutory subrogee against a third party~~. A statutory subrogee's subrogation interest includes past payments of compensation and medical benefits and estimated future values of compensation and medical benefits arising out of an injury to or disability or disease of a claimant~~, and the statutory subrogee is subrogated to the rights of a claimant against that third party. The net amount recovered is subject to a statutory subrogee's right of recovery.

(B) If a claimant, statutory subrogee, and third party settle or attempt to settle a claimant's claim against a third party, the claimant shall receive an amount equal to the uncompensated damages divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered, and the statutory subrogee shall receive an amount equal to the subrogation interest divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered, except that the net amount recovered may instead be divided and paid on a more fair and reasonable basis that is agreed to by the claimant and statutory subrogee. If while attempting to settle, the claimant and statutory subrogee cannot agree to the allocation of the net amount recovered, the claimant and statutory subrogee may file a request with the administrator of workers' compensation for a conference to be conducted by a designee appointed by the administrator, or the claimant and statutory subrogee may agree to utilize any other binding or non-binding alternative dispute resolution process.

The claimant and statutory subrogee shall pay equal shares of the fees and expenses of utilizing an alternative dispute resolution process, unless they agree to pay those fees and expenses in another manner. The administrator shall not assess any fees to a claimant or statutory subrogee for a conference conducted by the administrator's designee.

(C) If a claimant and statutory subrogee request that a conference be conducted by the administrator's designee pursuant to division (B) of this section, both of the following apply:

(1) The administrator's designee shall schedule a conference on or before sixty days after the date that the claimant and statutory subrogee filed a request for the conference.

(2) The determination made by the administrator's designee is not subject to Chapter 119. of the Revised Code.

(D) When a claimant's action against a third party proceeds to trial and damages are awarded, both of the following apply:

(1) The claimant shall receive an amount equal to the uncompensated damages divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered, and the statutory subrogee shall receive an amount equal to the subrogation interest divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered.

(2) The court in a nonjury action shall make findings of fact, and the jury in a jury action shall return a general verdict accompanied by answers to interrogatories that specify the following:

(a) The total amount of the compensatory damages;

(b) The portion of the compensatory damages specified pursuant to division (D)(2)(a) of this section that represents economic loss;

(c) The portion of the compensatory damages specified pursuant to division (D)(2)(a) of this section that represents noneconomic loss.

(E)(1) After a claimant and statutory subrogee know the net amount recovered, and after the means for dividing it has been determined under division (B) or (D) of this section, a claimant may establish an interest-bearing trust account for the full amount of the subrogation interest that represents estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits, reduced to present value, from which the claimant shall make reimbursement payments to the statutory subrogee for the future payments of compensation, medical benefits, rehabilitation costs, or death benefits. If the workers' compensation claim associated with the subrogation interest is settled, or if the claimant dies, or if any other circumstance occurs that would preclude any future payments of

compensation, medical benefits, rehabilitation costs, and death benefits by the statutory subrogee, any amount remaining in the trust account after final reimbursement is paid to the statutory subrogee for all payments made by the statutory subrogee before the ending of future payments shall be paid to the claimant or the claimant's estate.

(2) A claimant may use interest that accrues on the trust account to pay the expenses of establishing and maintaining the trust account, and all remaining interest shall be credited to the trust account.

(3) If a claimant establishes a trust account, the statutory subrogee shall provide payment notices to the claimant on or before the thirtieth day of June and the thirty-first day of December every year listing the total amount that the statutory subrogee has paid for compensation, medical benefits, rehabilitation costs, or death benefits during the half of the year preceding the notice. The claimant shall make reimbursement payments to the statutory subrogee from the trust account on or before the thirty-first day of July every year for a notice provided by the thirtieth day of June, and on or before the thirty-first day of January every year for a notice provided by the thirty-first day of December. The claimant's reimbursement payment shall be in an amount that equals the total amount listed on the notice the claimant receives from the statutory subrogee.

(F) If a claimant does not establish a trust account as described in division (E)(1) of this section, the claimant shall pay to the statutory subrogee, on or before thirty days after receipt of funds from the third party, the full amount of the subrogation interest that represents estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits.

(G) A claimant shall notify a statutory subrogee and the attorney general of the identity of all third parties against whom the claimant has or may have a right of recovery, except that when the statutory subrogee is a self-insuring employer, the claimant need not notify the attorney general. No settlement, compromise, judgment, award, or other

recovery in any action or claim by a claimant shall be final unless the claimant provides the statutory subrogee and, when required, the attorney general, with prior notice and a reasonable opportunity to assert its subrogation rights. If a statutory subrogee ~~is~~ and, when required, the attorney general are not given that notice, or if a settlement or compromise excludes any amount paid by the statutory subrogee, the third party and the claimant shall be jointly and severally liable to pay the statutory subrogee the full amount of the subrogation interest.

~~(C)~~(H) The right of subrogation under this chapter is automatic, regardless of whether a statutory subrogee is joined as a party in an action by a claimant against a third party. A statutory subrogee may assert its subrogation rights through correspondence with the claimant and the third party or their legal representatives. A statutory subrogee may institute and pursue legal proceedings against a third party either by itself or in conjunction with a claimant. If a statutory subrogee institutes legal proceedings against a third party, the statutory subrogee shall provide notice of that fact to the claimant. If the statutory subrogee joins the claimant as a necessary party, or if the claimant elects to participate in the proceedings as a party, the claimant may present the claimant's case first if the matter proceeds to trial. If a claimant disputes the validity or amount of an asserted subrogation interest, the claimant shall join the statutory subrogee as a necessary party to the action against the third party.

~~(D) The entire amount of any settlement or compromise of an action or claim is subject to the subrogation right of a statutory subrogee, regardless of the manner in which the settlement or compromise is characterized. Any settlement or compromise that excludes the amount of compensation or medical benefits shall not preclude a statutory subrogee from enforcing its rights under this section. The entire amount of any award or judgment is presumed to represent compensation and medical benefits and future estimated values of compensation and medical benefits that are subject to a statutory subrogee's subrogation rights unless the claimant obtains a special verdict or jury interrogatories~~

~~indicating that the award or judgment represents different types of damages.~~

~~(E) Subrogation does not apply to the portion of any judgment, award, settlement, or compromise of a claim to the extent of a claimant's attorney's fees, costs, or other expenses incurred by a claimant in securing the judgment, award, settlement, or compromise, or the extent of medical, surgical, and hospital expenses paid by a claimant from the claimant's own resources for which reimbursement is not sought. No additional attorney's fees, costs, or other expenses in securing any recovery may be assessed against any subrogated claims of a statutory subrogee~~ (I) The statutory subrogation right of recovery applies to, but is not limited to, all of the following:

(1) Amounts recoverable from a claimant's insurer in connection with underinsured or uninsured motorist coverage, notwithstanding any limitation contained in Chapter 3937. of the Revised Code;

(2) Amounts that a claimant would be entitled to recover from a political subdivision, notwithstanding any limitations contained in Chapter 2744. of the Revised Code;

(3) Amounts recoverable from an intentional tort action.

(J) If a claimant's claim against a third party is for wrongful death or the claim involves any minor beneficiaries, amounts allocated under this section are subject to the approval of probate court.

(K) The administrator shall deposit any money collected under this section into the public fund or the private fund of the state insurance fund, as appropriate. If a self-insuring employer collects money under this section of the Revised Code, the self-insuring employer shall deduct the amount collected, in the year collected, from the amount of paid compensation the self-insured employer is required to report under section 4123.35 of the Revised Code.

In S.B. 227, the General Assembly repealed existing R.C. 4123.35, 4123.66, 4123.93, and 4123.931. The statute became effective April 9, 2003, and, under its express terms, applies to workers injured on or after that date.

{¶27} 13. On April 15, 2003, the UAW filed a mandamus action in the Franklin County Court of Appeals seeking a writ compelling the BWC to comply with *Holeton.* The complaint also seeks a writ compelling the BWC to follow the law in *Glaspell v. Ohio Edison Co.* (1987), 29 Ohio St.3d 44, in which the court held as follows, at paragraphs one and two of the syllabus:

> While clauses limiting the liability of the drafter are ordinarily to be strictly construed, such strict construction need not be applied in the interpretation of an indemnification agreement entered into between business entities in a context of free and understanding negotiation.
>
> When the subject of liability is anticipated in an enforceable indemnity agreement, such indemnification must be provided.

The Court in *Glaspell* also commented on the construction of certain types of indemnity agreements that are contracts of adhesion:

> * * * [T]he law of Ohio generally allows enforcement of indemnity agreements.
>
> Where it is alleged that the agreement protects an indemnitee from the financial consequences of his own negligence, the greater weight of authority, particularly in Ohio, would construe the words of such an agreement most narrowly.
>
> The requirement that this court strictly construe this particular category of indemnity agreement would be unreasonable, in that the rule was developed to guard

> against a specific practice. Often one party to a contract, being in a position to impose terms upon the other with no realistic opportunity to bargain afforded, would include those standardized clauses in the contract as would unreasonably impose upon the nonbargaining party burdens which were wholly inequitable. With such contracts of adhesion in hand, the drafting party invariably asserted, "the indemnity or the exculpation, so that the policies supporting the rule of 'contra proferentem' [against the proffering party], * * * caused the courts to apply the rule." Thus, while clauses limiting the liability of the drafter are ordinarily to be strictly construed, we need not do so when such burden of indemnification was assented to in a context of free and understanding negotiation. * * *

Id. at 46-47. (Citations omitted.)

{¶28} 14. After the complaint was filed, this action was referred to the undersigned magistrate. On May 7, 2003, the BWC filed a motion to dismiss, arguing inter alia that the UAW lacked standing to bring the action and that it had an adequate remedy in the ordinary course of law and was not entitled to an extraordinary writ of mandamus.

{¶29} 15. On August 21, 2003, the magistrate entered an order stating that a ruling on the motion to dismiss would be deferred, and that the merits would be briefed. The BWC filed an answer. One item of certified evidence was submitted, as stated above, and the parties filed briefs. On January 14, 2004, oral argument was held before the magistrate.

Conclusions of Law:

{¶30} In order for the court to issue a writ of mandamus, relator must prove that the respondent has a clear legal duty to perform the requested action, that relator has a clear right to the requested relief, and that relator has no plain and adequate remedy in

the ordinary course of the law. E.g., *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28. In addition, a threshold requirement in every action is that the complaining party must establish standing to sue. *Ohio Contractors Assn. v. Bicking* (1994), 71 Ohio St.3d 318.

Standing

{¶31} With respect to standing, the magistrate concludes that relator has established sufficient organizational standing to bring this action on behalf of its members. See, e.g., *Ohio Contractors Assn,* supra; *Ohio Academy of Nursing Homes, Inc. v. Barry* (1987), 37 Ohio App.3d 46. See, generally, *State ex rel. United Auto Aerospace & Agricultural Implement Workers of Am. v. Ohio Bur. of Workers' Comp.*, 95 Ohio St.3d 408, 2002-Ohio-2491 (hereinafter "*United Auto Aerospace*"); *State ex rel. Ohio AFL-CIO v. Ohio Bur. of Workers' Comp.*, 97 Ohio St.3d 504, 2002-Ohio-6717 (hereinafter "*AFL-CIO*") .

Compliance with the Mandate in *Holeton*

{¶32} In this action, relator insists that it is not seeking a determination that S.B. 227 (as codified in the new version of R.C. 4123.931) is unconstitutional. Rather, relator asserts that it simply wants the BWC to "comply with *Holeton*."

{¶33} However, the Ohio Supreme Court in *Holeton* ruled only that H.B. 278, as codified in former R.C. 4123.931, was unconstitutional. The court expressly held "only" that R.C. 4123.931 "in its present form" was unconstitutional. The court did not order any action to be performed by any party. To the extent the court issued a "mandate" in

Holeton, it essentially mandated that no lower court could apply H.B. 278 as codified in former R.C. 4123.931 and that the BWC must refrain from applying H.B. 278 as codified in former R.C. 4123.931.

{¶34} In the present action, however, there is no evidence that the BWC continued after the decision in *Holeton* to apply the provisions of former R.C. 4123.931. Accordingly, a writ ordering the BWC to comply with *Holeton* is not warranted.

Compliance with *Glaspell*

{¶35} With respect to *Glaspell,* supra, the magistrate is not convinced that the decision imposes an affirmative duty on the BWC to perform a specific act. Rather, cases such as *Glaspell* arise when a contracting party seeks enforcement of a particular contract or agreement, and another contracting party seeks to have the contract interpreted against the drafter and/or ruled unenforceable as an adhesion contract. See *Sekeres v. Arbaugh* (1987), 31 Ohio St.3d 24; *Conkey v. Eldridge* (Dec. 2, 1999), Franklin App. No. 98AP-1628; *Central Ohio Graphics, Inc. v. O'Brien Business Equip., Inc.* (Mar. 28, 1996), Franklin App. No. 95APE08-1016; *Thompson v. Otterbein College* (Feb. 6, 1996), Franklin App. No. 95APE08-1009. See, also, *Daniel E. Terreri & Sons, Inc. v. Mahoning Cty. Bd. of Commrs.*, 152 Ohio App.3d 95, 2003-Ohio-1227; *Information Leasing Corp. v. Jaskot*, 151 Ohio App.3d 546, 2003-Ohio-566; *Widlar v. Matchmaker Internatl.*, Lucas App. No. L-01-1433, 2002-Ohio-2836; *Wall v. Firelands Radiology, Inc.* (1995), 106 Ohio App.3d 313.

{¶36} In this action, however, the evidence does not include any contracts; there is no specific contract that either party seeks to enforce or have held unenforceable. Without a contract to review, the court cannot hold under *Glaspell* that a contract is unenforceable as an adhesion contract. An extraordinary writ compelling the BWC to refrain from entering adhesion contracts generally would require proof that the BWC had entered adhesion contracts. Moreover, the courts do not issue writs of mandamus to compel observance of a law generally. *State ex rel. Tillimon v. Weiher* (1992), 65 Ohio St.3d 468; *State ex rel. Kuczak v. Saffold* (1993), 67 Ohio St.3d 123.

Adequate Remedy at Law

{¶37} In order for relator to pursue an action in mandamus, it must establish that it has no adequate remedy at law. E.g., *Berger,* supra. In the present action, the magistrate concludes that, to the extent that relator's action seeks to have the court find S.B. 227 unconstitutional as codified in R.C. 4123.931, relator and its members have adequate remedies in the ordinary course of law. Specifically, relator may file a declaratory judgment action under R.C. Chapter 2721 seeking a determination of the rights of injured workers under state law, and its members who are injured workers with claims against third-party tortfeasors may seek a determination in the course of their tort actions, as did the claimant-plaintiff in *Holeton.*

{¶38} In reaching this conclusion, the magistrate first considered the claimed wrongs for which relator seeks a remedy. As set forth above, a review of the legislation indicates that, after the Supreme Court declared former R.C. 4123.931 unconstitutional,

the General Assembly amended it in a number of ways. For example, the legislature deleted portions of the statute regarding the rights of beneficiaries in a wrongful death action, attempting to remove the provision that operated unconstitutionally to allow one person's tort recovery to be reduced or extinguished by another person's workers' compensation benefits.

{¶39} In addition, the legislature deleted the language stating that the "entire amount of any settlement" is subject to the subrogation rights of the BWC or employer, which appears to have removed the unrebuttable presumption that all the proceeds of a settlement award constitute a double recovery subject to reimbursement of subrogation interest. In addition, a new section in S.B. 227 provides for allocation of the tort recovery between those items compensated by workers' compensation benefits and those items not compensated under the workers' compensation system—with the allocation being made by a jury in cases that proceed to trial, and the allocation being made by agreement of the claimant, BWC, and other parties in cases that are settled. Relator raises substantial questions about whether the new provisions are unconsti-tutional under Ohio law as elucidated in *Holeton,* but the magistrate concludes that the ordinary course of law provides an adequate process for addressing and answering this question.

{¶40} Similarly, with regard to the problem of overestimated future benefits, a new provision in S.B. 227 represents a legislative attempt to prevent the risk of overestimated future expenses from falling on the innocent claimant: under the new provision, any overestimated future expenditures may be returned to the claimant's beneficiaries with

accrued interest. Again, relator raises important questions as to whether the General Assembly has succeeded in enacting legislation that satisfies constitutional requirements as explained in *Holeton*, and relator presents forceful arguments that S.B. 227, despite its new and different language, does not effect the state's legitimate goal of preventing double recoveries without imposing unreasonable burdens on injured workers who are tort victims of third-party tortfeasors. Relator contends that S.B. 227 infringes on the constitutional rights of these injured workers in the same way that H.B. 278 did.

{¶41} Nonetheless, notwithstanding this recognition of the significant constitutional issues raised by relator, the magistrate concludes that these issues can be addressed in the ordinary course of law. In *Holeton*, the constitutional issue regarding H.B. 278 was raised in the ordinary course of law in a tort action commenced in a trial court, a procedural fact that the Supreme Court explicitly noted. Moreover, the Supreme Court in *Holeton* observed that the constitutionality of H.B. 278 was being challenged in tort actions across the state and that the court had already granted two discretionary appeals. The opinion reflects that injured workers aggrieved by the subrogation provisions in H.B. 278 were pursuing their rights in the ordinary course of law, and the Supreme Court gave no indication in *Holeton* that the Ohio courts were failing to provide an adequate remedy in the ordinary process of law.

{¶42} Further, the situation here is unlike the situations in *Sheward, United Auto Aerospace*, and *AFL-CIO*, each of which had special features that distinguish it from the present action. *Sheward* involved a "rare and extraordinary case" of unusual "magnitude

and scope" in which relators contended that the legislation violated the fundamental separation of powers and divested the courts of judicial power; according to the court, the legislation represented a legislative attempt to usurp the power of the Ohio Supreme Court, as demonstrated in the legislature's "statements of intent with regard to the constitutionality" of its legislation in the uncodified sections of the bill. See *Sheward*, supra, at 459, fn. 7, 467, 474-476, 503-504. Further, the legislation at issue in *Sheward* was a massive bill affecting every tort action in Ohio and involving "at least forty-eight separate topics," id. at fn. 6, and the court indicated that piecemeal determinations of the constitutionality of the multifarious components of the enormous legislation through individual tort actions was not warranted. Id. at 458, 468.

{¶43} In *AFL-CIO*, the court stated that granting writs of mandamus and prohibition to determine the constitutionality of statutes will "remain extraordinary" and "limited to exceptional circumstances that demand early resolution." Id. at ¶12 (quoting Justice Pfeifer's concurrence in *Sheward*). However, *AFL-CIO* involved legislation that would subject workers across the state to unreasonable invasions of their bodily privacy without individualized suspicion—in violation of the constitutional protection against unreasonable searches and seizures—unless prompt action was taken to invalidate the statute, and the court expressed its concern about the "indignity" of such testing without reasonable cause for the intrusion. Id. at ¶51. Although the court did not explicitly analyze why an action at law would not have been adequate to protect the rights of these injured workers, the opinion refers to the need for early resolution and suggests that a delay

would have resulted in thousands of innocent workers being subjected to the indignity of meritless searches with no constitutional basis, and no remedy for most victims other than a subsequent statement that the search had been impermissible. Just as it is true that one cannot "unring a bell," *United States v. Murray* (C.A.6, 1986), 784 F.2d 188, 189, one cannot erase the indignity of a bodily search that is later found to be legally impermissible, and the court's use of extraordinary proceedings appeared to be based in part on the need for prompt action to prevent thousands of unjustified personal searches. Thus, the circumstances in *AFL-CIO* differ significantly from those in the present action.

{¶44} Likewise, the situation in *United Auto Aerospace* presented an unusual dispute suitable for prompt resolution in an extraordinary action. There, the Administrator of the BWC had a clear and unambiguous legal duty to promulgate a rule in certain circumstances, and he failed to promulgate a rule before implementing an exercise of authority regarding premiums. *United Auto Aerospace,* at ¶7–10. However, the Administrator mooted the issue by subsequently promulgating a rule. Although the Supreme Court did not state explicitly that such violations of clear duty were likely to evade review of *any* kind unless addressed in the action before it, such a concern appears to underlie the court's ruling.

{¶45} In the present action, S.B. 227 may or may not pass constitutional review, but the legislation reveals no attempt to divest the courts of judicial powers granted by the state constitution as in *Sheward,* nor has the General Assembly attempted to usurp the Supreme Court's authority by refusing to recognize its holdings. Likewise, this action does

not present a moot but significant issue that could evade review completely unless addressed in the present action. Further, an action in declaratory judgment or in tort has not been demonstrated to be inadequate for resolving the issues presented here.

{¶46} The magistrate recognizes that the holdings in *AFL-CIO* and *United Auto Aerospace* regarding mandamus relief could be expanded to include the present action. However, such an expansion of the court's extraordinary jurisdiction in mandamus is not appropriate where ordinary remedies appear to be readily available.

{¶47} In summary, the magistrate concludes that relator has not met its burden in mandamus of proving that the BWC has refused to comply with *Holeton* or *Glaspell.* To the extent relator seeks a holding that S.B. 227 is unconstitutional under the principles articulated in *Holeton,* relator has raised serious and substantial questions, but extraordinary relief in mandamus is not warranted because relator and/or the injured workers it represents have adequate remedies in the ordinary course of law.

{¶48} Accordingly, the court should deny the requested writ of mandamus or grant respondents' motion to dismiss.

/s/ P.A. Davidson
P. A. DAVIDSON
MAGISTRATE